

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

CASE NO. 00-22334

PATRICIA A. LANKHEET,

Debtors.

DECISION & ORDER

BACKGROUND

On August 11, 2000, Patricia A. Lankheet (the "Debtor") filed a petition initiating a Chapter 7 case. On the Schedules and Statements required to be filed by Section 521 and Rule 1007, the Debtor, a registered nurse, indicated that she had: (1) unsecured indebtedness of \$58,947.91; and (2) total combined monthly income, after payroll deductions, of \$3,420.48, which included support payments.

On September 19, 2000, the Debtor's trustee (the "Trustee"), conducted a Meeting of Creditors and on September 20, 2000 he filed a No Asset Report. On November 28, 2000, the Debtor received a discharge, and on December 15, 2000 a Final Decree was entered and the Debtor's Chapter 7 case was closed.

On March 2, 2001, the Trustee filed an application to have the Debtor's Chapter 7 case reopened because it appeared that after her Section 341 Meeting, but within one hundred eighty days after the filing of her petition, the Debtor's interest in

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a decedent's estate became vested and her inheritance became property of the bankruptcy estate under Section 541(a)(5).

On April 22, 2002, the Trustee filed his Final Report and Application for Compensation which: (1) indicated that he had received \$53,311.40 as the Debtor's inheritance; (2) requested the maximum compensation provided for by Section 326(a)¹ in the amount of \$5,958.20; and (3) included detailed time records for the services he had performed, a requirement recently imposed by the Office of the United States Trustee in the Rochester Division of the Western District of New York (the "U.S. Trustee"), which indicated that four hours was expended by the Trustee in the administration of the Debtor's Chapter 7 case.

On April 22, 2002, the U.S. Trustee filed an Objection (the "Objection") to the Trustee's requested compensation which asserted that: (1) if the Court allowed the compensation

¹ Section 326 - Limitation on compensation of trustee, provides that:

(a) In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to exceed 25 percent on the first \$5,000 or less, 10 percent on any amount in excess of \$5,000 but not in excess of \$50,000, 5 percent on any amount in excess of \$50,000 but not in excess of \$1,000,000, and reasonable compensation not to exceed 3 percent of such moneys in excess of \$1,000,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.

11 U.S.C. § 326(a) (2002).

requested for the four hours of time expended by the Trustee to administer the Debtor's Chapter 7 case, it would equate to an hourly rate of approximately \$1,490.00; (2) the commissions computed under Section 326 are a maximum compensation, not an automatic award, because the Court is required under Section 330²

² Section 330 provides, in part, that:

(a) (1) After notice to the parties in interest and the United States trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103 -

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3) (A) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including -

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

(E) whether the compensation is reasonable based on the customary

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to allow only reasonable compensation for the actual and necessary services rendered by a trustee; and (3) an award to the Trustee of \$5,958.20 in this case would not be reasonable.

On June 7, 2002, the Trustee filed a Submission in Support of his Final Report and Application for Compensation which asserted that: (1) the results achieved in the Debtor's Chapter 7 case were "remarkable," in that the creditors who had filed claims would receive a dividend of approximately one hundred fourteen percent (114%) of the principal amount of their claims; (2) because the attorney for the decedent's estate involved did all of the legal work which an attorney for the trustee might otherwise have been required to perform, the total compensation and expenses the Trustee had requested was only 11.2% of the funds available for distribution to creditors; (3) no creditor had objected to the compensation requested; (4) although Section 326 requires the Court to determine a reasonable compensation under Section 330, the case law that has developed under the Section deals primarily with the determination of what is a reasonable legal fee rather than what is a reasonable trustee

compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. § 330 (2002).

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compensation; (5) in most cases where courts have reduced trustee compensation below the Section 326 maximum commissions: (a) the trustee, to the economic detriment of creditors, has in some way failed to properly administer the estate; or (b) the maximum compensation would consume such a disproportionate amount of the funds available for distribution that there could be no meaningful distribution to creditors; (6) the Objection of the U.S. Trustee, based upon a lodestar approach of the Section 326 maximum commissions divided by the number of hours expended, is not as appropriate when awarding compensation for trustee services as it is for awarding compensation for legal services; (7) the Court should adopt a totality of circumstances approach to the allowance of compensation to trustees under Section 326, which would take into account: (a) the "commission schedule" established by Section 326, that the Trustee asserted was intended by Congress to provide an incentive to trustees to work hard to discover and marshal assets for the benefit of creditors, with percentage commissions being paid out of the common fund, rather than having full-time, salaried, government employed trustees; (b) in 1994 the Section 326 commission schedule was increased; (c) it is common knowledge that trustees are under-compensated for their services in no asset cases,

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which is partially offset by the commissions they receive in asset cases; (d) trustee work has traditionally been considered to be contingent fee work, where high recovery and low recovery matters average out and make the work desirable for some attorneys and qualified laypersons; (e) the U.S. Trustee's assertion that reasonable compensation under Sections 326 and 330 for trustee services is a contingent fee with an hourly cap would make the economics of this type of contingent fee work unattractive to potential panel members; and (f) in the Rochester Division of the Western District of New York, there is an expectation that the members of the Panel of Trustees are a part of a bankruptcy system and at times, without compensation: (i) the U.S. Trustee will require the Panel members to attend meetings and training sessions; and (ii) the Court will expect the Panel members to bring issues and important matters of precedent before it for decision; and (8) when a totality of the circumstances approach is adopted, the compensation requested in this case, where the creditors are being paid in full with a value-added factor, is not unreasonable.

On June 25, 2002, the U.S. Trustee forwarded to the Court and the Trustee a copy of an article which appeared in the "NAB Talk" (Summer 2002) publication that addressed the issue of

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reasonable compensation under Sections 326 and 330 for trustee services. The Article indicated that: (1) Section 326 established a maximum for trustee compensation that was not an entitlement; and (2) H.R. 333, entitled "Act to Amend Title 11 U.S.C.," and for other purposes, that passed on July 17, 2001, if enacted will amend Section 330 to provide that in determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission.

DISCUSSION

I. Section 330 Compensation for Professionals Employed under Section 327.

In *In re Interco Systems, Inc.* (Case No. 93-20144, August 1, 1994), the Court set forth its approach to awarding reasonable compensation for attorneys employed under Section 327, as follows:

In reviewing fee applications and making its determination of an award of reasonable compensation, this Court begins with the "lodestar" approach established by the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) where the court determines a reasonable number of hours for the work performed, then a reasonable hourly rate for the work performed, which is then multiplied to

obtain a "lodestar" amount which may be adjusted upwards or downwards in light of statutory policies and purposes and other relevant factors. In arriving at a reasonable number of hours and a reasonable hourly rate for the work performed, many courts still consider the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974),⁴ as well as other relevant and appropriate factors warranted by the particular facts and circumstances presented.

⁴ These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases (the "Johnson Factors").

II. Reasonable Compensation for Trustees.

A. Awards of Less Than the Maximum Compensation Provided for by Section 326

When an objection is made by the U.S. Trustee or an interested party, Bankruptcy Courts sometimes award, as reasonable compensation to a trustee, an amount that is less than the Section 326 maximum commissions. Most frequently, this

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occurs when: (1) the trustee has failed to properly administer an estate, so that: (a) there has been economic prejudice to creditors or the debtor; or (b) the U.S. Trustee has had to spend an inordinate amount of time in monitoring the case or filing motions to have the Court require the trustee to perform the duties required by Section 704 in an efficient and effective manner; or (2) the Section 326 maximum commissions would consume an inordinate amount of the assets of the estate so that there could be no meaningful distribution to creditors.³

Although other Bankruptcy Courts have decided this issue, the Objection by the U.S. Trustee is the first time since I was appointed that I have been asked to allow, as reasonable compensation to a trustee, an amount that is less than the Section 326 maximum commissions, where: (1) there is no question that the estate was properly, efficiently and effectively administered; and (2) no creditor has objected or been economically prejudiced by the trustee's administration of the estate.⁴

³ In that situation, oftentimes the trustee will voluntarily request less than the Section 326 maximum commission.

⁴ It may be that there have been similar factual situations where the U.S. Trustee and the Trustee have agreed to a compensation that was less than the Section 326 maximum commissions, however, the matter was not brought before the Court.

B. Reasonable Compensation in this Case.

After considering all of the facts and circumstances presented, including the requirements and factors set forth in Section 330 and the Johnson Factors, in my discretion, I do not find that the Trustee's request for compensation in the amount of \$5,958.20 is unreasonable.

On the facts of this case, I believe that special emphasis must be given to: (1) the contingent nature of trustee work, as a Section 330(a)(3)(A) element and a Johnson Factor; and (2) the Section 330(a)(3)(A) element of the value of the services performed.

i. The Contingent Nature of Trustee Work.

For the approximately twenty-eight years that I have practiced or served as a judicial officer in the Rochester Division of the Western District of New York, Trustee work has always been considered contingent fee work, where, as the Trustee has asserted: (1) notwithstanding Section 330, the compensation received in the few asset cases administered would compensate the trustee for the many no-asset cases administered; and (2) except in instances where the Trustee had failed to efficiently and effectively administer the estate, or where the Section 326 maximum commissions would prevent a meaningful

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distribution to creditors, Trustees would receive the Section 326 maximum commissions.⁵

I believe trustee work is contingent fee work, and unless upon the facts and circumstances of a particular case the Section 326 maximum commissions are clearly unreasonable compensation, the contingent fee nature of the services that the trustees perform will be the principal factor the Court will consider in determining Section 330 reasonable compensation.⁶

ii. Value of the Services Performed.

In this case, if the Section 326 maximum compensation are allowed, the services of the Trustee will have resulted in the creditors receiving a distribution of one hundred percent (100%) plus a value added factor at a cost of only approximately eleven percent (11%) of funds available for distribution. In the absence of a bankruptcy, these same creditors, in order to

⁵ The Objection of the U.S. Trustee, apparently in furtherance of a nationwide initiative, and this Decision & Order, should be sufficient notice to the Panel of Trustees serving in the Rochester Division of the Western District of New York that, unless the pending legislation is enacted, there may be cases in the future where, given the time and routine nature of the services performed, an award of compensation in the amount of the Section 326 maximum commissions would not be found by this Court to be a reasonable compensation.

⁶ In part, this is an acknowledgment that in the Rochester Division of the Western District of New York Panel Trustees are often asked by the Court to go above and beyond the call of duty to bring matters before the Court, without compensation, that benefit various stakeholders in the bankruptcy system in this community.

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realize upon the Debtor's inheritance, would have had to retain an attorney in New York, most likely on a contingent fee basis of between twenty-five percent (25%) and thirty-three percent (33%) of any recovery, plus expenses, in order to obtain a judgment against the Debtor which would then be required to be executed upon at an additional cost of five percent (5%) poundage to be paid to the executing official. If the Debtor's creditors had enforced their rights in this manner, at a cost of at least thirty percent (30%) per creditor of any funds recovered, the creditors who filed claims in this case and are receiving a distribution of in excess of one hundred percent (100%) of their principal, would not all have been paid in full, and some might not have been paid at all. As a result, the value of the services provided in this case to the creditors by the Trustee and the bankruptcy system make the compensation requested by the Trustee very reasonable.

In addition to the valuable services provided to the creditors, the bankruptcy system, of which the Trustee is an integral part, has provided the Debtor with a discharge of all of her debts in exchange for the distribution of all of her non-exempt assets, which in this case amounted to less than the total of her unsecured indebtedness. Without the services of

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the Trustee and the bankruptcy system, the Debtor would not have been able to pay her unsecured indebtedness of in excess of \$58,000.00 with her inheritance of less than \$54,000.00.⁷

CONCLUSION

In view of the contingent nature of the services performed by the Trustee in this case and the value of those services to: (1) the creditors, who will receive a distribution of one hundred percent (100%) plus a value added factor; (2) the Debtor, who was insolvent even with her inheritance, but received a discharge from all of her debts; and (3) the bankruptcy system, I find that the compensation requested by the Trustee in the amount of \$5,958.20 is reasonable, and it is hereby allowed.

IT IS SO ORDERED.

**HON. JOHN C. NINFO, II
CHIEF U.S. BANKRUPTCY JUDGE**

⁷ To the extent that a reduction in the compensation requested by the Trustee might result in a distribution of surplus to the Debtor simply because some of her creditors failed to file claims, that would result in a windfall to the Debtor at the unnecessary expense of the Trustee.

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Dated: July 30, 2002